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CLERK

IN THE

Supreme Court of the United States

No. 402 27

BRUCE'S JUICES, INC., *Petitioner*

vs.

AMERICAN CAN COMPANY

PETITION FOR RE-HEARING AND FOR STAY OF MANDATE

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To the Honorable Justices of the Supreme Court of the United States:

Bruce's Juices, Inc., petitioner in this cause, respectfully presents its petition for re-hearing, and submits as grounds therefor the following:

The importance of this litigation is not restricted to the litigants nor to the canning industry, but the legal principles involved directly, and vitally, affect substantially the entire field of enterprise engaged in the purchase or sale of commodities in appreciable volume. While the determination of the questions incident to this case inherently affects the policies, trade practices and financial welfare of all who are within the sphere of the Anti-Trust laws, the group which

is most vitally affected thereby is composed of those who rely upon such laws for protection.

Even in the initial stage of this cause, the attention of the canning industry was focused upon the unusual legal questions presented and the temerity of Bruce's Juices, Inc., in challenging the practices of the American Can Company. This interest was greatly intensified upon the handing down of the first opinion of the Florida Supreme Court (R. 593-601) wherein the principle was enunciated, upon the authority of the decisions of this Court, that a vendor, guilty of violation of the Robinson-Patman Act, cannot effect recovery of the purchase price of the merchandise sold where the transaction is tainted with such illegality.

While the principle was not new, inasmuch as this Court had long before enunciated a like doctrine under the earlier Anti-Trust laws, its decisions had largely been ignored by those concerns whose practices such laws sought to control. That equally scant attention had been given to the Robinson-Patman Act by many in the industrial world has long been common knowledge. The attention of both sellers and buyers, in many and varied industries was, therefore, sharply centered upon the outcome of this litigation and profound interest was evidenced in the well reasoned, and amply supported, conclusion stated in the first opinion of the Florida Court. But clarity of precedent ended and the law was plunged into confusion by the ambiguous and ill-considered subsequent opinion of that Court (R. 621). The result of the thirty-one word per curiam statement was to affirm judgment against petitioner, without, in any wise, challenging the principles which had theretofore been categorically enunciated.

Certiorari was granted by this Honorable Court, briefs were filed, arguments had and an appreciable portion of the industrial world confidently looked to this Court to end the confusion and to settle, once and for all, the real practical effect of the Robinson-Patman Act, upon which the small merchant had relied as a bulwark of protection against unfair trade practices. Then the decision of this Honorable Court, "Judgment affirmed by an equally divided Court", and again the rights of all parties affected by this Act were shrouded in doubt and confusion was multiplied. While the affirmance of the judgment affects only petitioner, the failure of this Court to enunciate authoritative precedent is of vital and serious moment to a very substantial segment of industry. No one is advised as to the nature of the question or questions upon which this Court has divided and consequently speculation and conjecture are rampant.

One result of the presently existing state of chaos is clear beyond doubt - - a flood of litigation will follow as those believing themselves to be victims of illegal price discriminations and practices seek every possible redress. An almost equally unfortunate effect of the existing uncertainty of precedent is the situation in which vendors, within the scope of the Act, are placed, i.e., complete inability to determine whether any particular policy, with reference to allowance of quantity discounts will be condemned by the Courts. Inevitably many entirely lawful trade practices of numerous manufacturers will be unnecessarily challenged. This condition of turmoil will continue, as likewise will the heavy burden of additional litigation, until such further time as the questions once again reach this Court and are here, once and for all, conclusively settled. Years will, in all probability, elapse before some other courageous victim of what he believes to be discriminatory practices is financially able,

willing and successful in treading the hazardous, expensive and nerve-racking road which leads to this Tribunal.

Petitioner has overcome many and serious obstacles along this road, with the end in view not alone of escaping from, what to it appears an unjust judgment, but likewise with the hope of securing an answer for its small business colleagues, to questions, which in many instances, means the difference between survival and financial demise. With all deference petitioner respectfully submits that it has brought here questions of such moment and significance in the commercial world as should not, until and unless every effort has been exhausted, meet the fate of a legal stalemate. That the questions are of public concern is a matter of common knowledge in the canning industry, and is borne out by the discussion which has been had in trade journals and similar publications. (See Appendix)

The nature of this case was, in our opinion, soundly stated by the Honorable Wright Patman, in his memorandum in support of petition for certiorari, as amicus curiae;

> "'The case presents Federal issues of outstanding importance in law and public policy",

and further:

> "I respectfully pray that the question of the validity of the defense interposed by petitioner be passed upon by the one Court in the land which can give it a definitive answer".

We are sincerely of the conviction that further argument and consideration will prove of assistance in enabling this Honorable Court to reach a majority decision. Necessarily re-argument would accomplish such result if same be

deferred until a full Bench is available. The resultant delay would be relatively unimportant and particularly is this true when consideration is given to the period over which this litigation has already extended and to the length of time which necessarily must elapse before the questions can again be lodged here. Such delay would prove to be the quickest method of providing a legal compass to guide the public, as well as the legal profession, through the presently uncharted sea.

We have not urged the position in which the petitioner finds itself, as ground for the granting of this motion, although we feel this should not be entirely overlooked. We have endeavored to point out the condition in which industry, large and small, manufacturer and purchaser, has been placed by the extraordinary course and present status of this litigation. The law, as previously announced by this Court, with reference to portions of the Anti-Trust laws — the Sherman and Clayton Acts — has become beclouded by this litigation. It is now uncertain whether the prior decisions have been modified or overruled. Likewise the effect, application and construction of the Robinson-Patman Act have been befogged and obscured by the anomalous second opinion of the Florida Court. The division of opinion in this Honorable Court has intensified the confusion.

It is, therefore, respectfully prayed that re-hearing be granted and after re-argument that this Honorable Court make further effort to enunciate authoritative precedent for the needed guidance of industry. Such precedent, whatever it may be, will, in our opinion, be greatly for the common good.

Should the foregoing motion be denied, petitioner respectfully shows unto the Court, as ground for the alternative askings hereinafter set forth, the following:

The result, should this Court follow its usual practice — where its members are equally divided — of affirming the judgment below, is unique, and of first impression, insofar as our research has disclosed.

The above assertion is predicated upon the assumption that the majority of the members of this Court are of the opinion that the determinative and controlling issue is the availability, vel non, of the defense, in a state court, of the violation of the statute and upon this question the Court has divided. If such be true, then the necessary and inevitable effect of the affirmance of the judgment would be, paradoxically, to reverse the expressed opinion of the majority of the Florida Court upon the controlling issue. That this is true is conclusively established by the history of the case in said Court:

1. In the first opinion, five members of the Court categorically held the defense available. Of the two dissenting members, Judge Terrell expressed no reason for so doing. The apparent effect of the language employed in Judge Buford's opinion was to approve the defense as he said: "I dissent because I think the sales contract which constituted a part of the plea was free of discrimination and *therefore the pleas were of no avail*", (R. 601) (Emphasis supplied)

2. Pursuant to re-hearing, (a) Judges Terrell, Brown and Buford voted for affirmance of judgment against petitioner upon the sole ground that the defense was not available *"under the facts submitted in evidence"*. (Emphasis

supplied), (b) Judges Chapman, Thomas and Adams dissented from the second opinion and adhered to the original opinion, (c) only Judge Sebring held the defense not available, and concurred in the majority second opinion solely upon that ground.

3. Therefore, the record discloses that a minimum of four members of the Florida Court have never departed from the conclusion and holding that the defense of the violation of the statute is available. *

Thus, should this Court permit the affirmance of judgment, petitioner will find itself in the anomalous situation of being subjected to judgment by reason of the division of opinion in this Court, notwithstanding that on the sole determinative issue but one member of the Florida Supreme Court has held against petitioner. Therefore, actually, this Court will reverse, by its failure to agree, the clear holding of the majority of the Court below and will thereby deprive petitioner of its Federal right to defend the action upon the ground of the violation of the Robinson-Patman Act.

To the end that such miscarriage of justice will not eventuate from the division of this Court, petitioner, therefore, respectfully prays:

(1) That the mandate or order of this Court be issued to the Supreme Court of Florida in such form as to require and direct said Court to enforce the conclusion and opinion expressed and held by a majority of the members thereof that the defense of violation of the Robinson-Patman Act is

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* Judges Chapman, Thomas, Adams and Brown. (Apparently Judge Buford likewise was of said opinion. The views of Judge Terrell on this issue were never reflected.)

available, and that this Court further order and direct the Court below to enter such order or judgment as will reverse the judgment of the trial Court and remand the cause for further proceedings consistent with the preservation to petitioner of the Federal right to interpose as a defense the violation of the statute.

(2) That this Court order, direct or request, as it may be advised, the Supreme Court of Florida to declare and state its determination and conclusion as to the availability, in the Florida Courts, of the defense of violation of the Robinson-Patman Act and that this Court thereafter consider and finally determine this cause in the light of such further opinion, declaration, or statement, as may be made by the Supreme Court of Florida.

(3) In the event of the denial of each of the askings hereinbefore made, then petitioner respectfully prays this Court to voice and express by opinion, or otherwise, the question or questions, which, in its judgment, is or are, determinative of this cause and upon which it has divided, to the end that the Supreme Court of Florida may be advised thereof and may, if it sees fit, further consider and adjudicate same.

Respectfully submitted

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Of Counsel:

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Washington, D. C.

I, counsel for Bruce's Juices, Inc., petitioner, do hereby certify that the foregoing petition for re-hearing of this cause is presented in good faith and not for delay.

CODY FOWLER,
Of Counsel for Bruce's Juices, Inc.

APPENDIX

The following article appeared on January 9th, 1946, in the AMERICAN GROCER, 90 West Broadway, New York 7, N. Y., a weekly journal of the food industry, of nationwide circulation:

"BRUCE'S JUICES CHAMPIONS SMALL BUSINESS

"Small and independent businessmen throughout the country and war veterans planning on starting their own business enterprises, are eagerly awaiting the outcome of a case to be argued before the United States Supreme Court on January 10th. It is the story of David and Goliath all over again, with Bruce's Juices, Inc., an independent fruit and vegetable canning company in Tampa, Florida, fighting the gigantic American Can Company.

"With trust-busting Thurman Arnold, recently resigned Circuit Court of Appeals judge and former Assistant Attorney General in charge of the Anti-Trust Division of the Department of Justice, as its attorney, Bruce's Juices charges that it was discriminated against on canning prices.

"Bruce's Juices claims that while it bought as many cans from the Tampa factory of the American Can Company as the local plants of much larger canning companies, the big concerns on the basis of aggregate purchases from the American factories all over the country, were granted a discount which was not given to the independent concern. The suit charges that this is a violation of the Robinson-Patman Act, and Representative Wright Patman, Chairman of the Housing Committee to investigate and study problems of small

business, was instrumental in getting the Supreme Court to hear the action.

> "If Bruce's Juices wins the litigation, it will mean that small and independent businessmen are 'in for a break' on the prices of materials purchased from companies with branch factories. — National Industries News service."

The same article in substance appeared in numerous weekly publications widely scattered throughout the country, among them being: Keansburg, N. J. News, January 11, 1946; Middletown Delaware Transcript, January 17; Pt. Jefferson, N. Y. Record, January 17; Chicago Federation News, February 2; Greensboro, N. C. Patriot, January 10; Carbondale, Illinois Daily Free Press, January 18; Lowell, Mass. Optic, January 12; Hawthorne, N. J. Press, January 24; Oklahoma City Daily Live Stock News, January 17; Chatom, Ala. News, January 17; Medina, N. Y. Daily Journal-Register, January 11; Whiting, Ind. Times, January 11.

In the January 14th issue of "The Canning Trade", Baltimore, Maryland, a long established journal devoted to the canning and allied industries, the following statement was made:

> "AN IMPORTANT SUIT — As we write there is scheduled to be presented to the United States Supreme Court a suit that might easily be all important. It is the suit of Bruce's Juices, Tampa, Fla., vs. the American Can Company. The special Correspondent of the N. Y. Journal of Commerce, at Washington, explains it well.
>
> " 'WASHINGTON, Jan. 8.—Canning trade interests throughout the nation will be watching carefully the outcome of a case to be placed before the United States Supreme Court here tomorrow — that of Bruce's

Juices, Inc., of Tampa, charging the American Can Co. with violation of the Robinson-Patman Act. The canner earlier had won the decisions in lower court bouts.

" 'Bruce's claims American Can gave illegal discounts on can prices to Florida units of large canning companies.

"Thurman Arnold, recently resigned Circuit Court of Appeals judge and former head of the Department of Justice's Anti-Trust Division, will make his first courtroom appearance since resuming private law practice, arguing the case for Bruce's.

PATMAN TO PARTICIPATE

" 'An unusual feature of the case is that Congressman Wright Patman, co-author of the Robinson-Patman Act and chairman of the House Small Business Committee, appears as "amicus curiae." He has informed the court that the case "presents Federal issues of outstanding importance in law and public policy.'

" 'In urging the high court to hear the case, Congresman Patman said, "It seems to me that the claims of law enforcement, independent business, and the system of free competitive enterprise unit in this plea."

" 'The action revolves around the refusal of Bruce's Juices, Inc., to pay on promissory notes held by the American Can Co. on the grounds of price discrimination. J. Adams Bruce, head of the canning firm, said that, while his purchases from American's Tampa factory were as large as those of the local units of large canning corporations, his competitors received discounts because of aggregate purchases from American's factories all over the country.

"FURTHER CASES SEEN

"'If Bruce's Juices wins the case there is a possibility that damage suits running into millions of dollars will be filed against American Can by independent canners throughout the country. Such a decision would also indicate that the present method of granting discounts on aggregate sales to chain production units would have to be abandoned and prices would be rated on purchases from individual factories.

"'In attacking the present system, Mr. Bruce said: "The practice of basing discounts upon aggregate purchases instead of upon orders filled from a single plant does not correctly reveal differences in costs. This system is a compulsion toward the absorption of small independent firms by the nation-wide corporation".'"

As a further reflection of the widespread interest in this cause, we quote from "Printers Ink" under date of January 25, 1946:

"Can discounts for cans be canned?

"BUSINESS WILL WATCH closely the suit of Bruce's Juices, canned citrus juice, Tampa, vs. American Can Co. when it is heard by the Supreme Court Jan. 28. J. Adams Bruce, president, contends that the Tampa factory of American Can should give him the same discounts it gives local plants of national canners. If Bruce wins (his attorney is Thurman Arnold) about 2,000 other canners may also sue American Can."

In the February 21 issue of the "Commercial and Financial Chronicle", an article was carried under the caption, "Supreme Court Fails to Clarify Robinson-Patman Act" in which the first paragraph reads:

"Last week abortive tie vote 'no decision' handed down by the United States Supreme Court in the case of Bruce's Juices vs. American Can Company leaves independent canners and producers in a quandary over some important parts of the Robinson-Patman Act".

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vs.

AMERICAN CAN COMPANY

MOTION TO STAY ISSUANCE OF MANDATE

Now comes Bruce's Juices, Inc., the petitioner in the above entitled cause, and shows unto the Court as follows:

1. Petitioner is herewith filing its petition for a re-hearing of this case for the purpose and reasons set forth in said petition;

2. Under Rule 34 of this Court, such petition will not operate to stay the Mandate or other process except by special order of the Court; and under Rule 33, such Mandate or other process will issue, as of course, after expiration of twenty-five (25) days from date of the judgment of this Court unless otherwise ordered;

3. In view of the nature of such petition for re-hearing and the end sought to be accomplished thereby, no useful purpose would be subserved if the Mandate or other process

of this Court should issue before the Court has disposed of such petition, but would cause unnecessary complications and delay.

WHEREFORE petitioner prays that:

The Mandate of this Court be stayed and withheld until the Further order of this Court.

DATED day of March, A. D. 1946.

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